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BEFORE THE BOARD OF OIL, GAS AND MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

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| <p>UTAH CHAPTER OF THE SIERRA CLUB, et al,</p> <p>Petitioners,</p> <p>vs.</p> <p>UTAH DIVISION OF OIL, GAS & MINING,</p> <p>Respondent,</p> <p>ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH,</p> <p>Respondent/Intervenors.</p> | <p>OPPOSITION TO THE UTAH DIVISION OF OIL, GAS & MINING'S MOTION FOR SUR-REPLY</p> <p>Docket No. 2009-019</p> <p>Cause No. C/025/005</p> |
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Respondent/Intervenor Alton Coal Development, LLC ("Alton Coal" or "ACD"), by and through its attorneys of record, file this Opposition to the Utah Division of Oil, Gas & Mining's Motion for Sur-Reply.

The only issue in this matter which is currently before the Board is whether Respondent/Intervenor Alton Coal Development, LLC has met the threshold demonstration of objective bad faith in this fee dispute between Alton Coal and Petitioners (Sierra Club, et al.).

The Utah Division of Oil, Gas and Mining (the “Division”) unnecessarily inserted itself into the dispute and submitted a Response Brief on the merits of that threshold issue. In doing so, the Division contradicted its earlier legal and factual positions set forth in signed pleadings before this Board and before the Utah Supreme Court.¹ Alton Coal submitted a Reply to the Division’s Response Brief (“DRB”), which referenced the Division’s earlier pleadings to demonstrate the Division’s inexplicable, contradictory positions and why they were irrelevant to the single issue now before the Board.

Now, the Division has moved to file a Sur-Reply, to explore whether it (i) “exceed[ed] the Division’s role to advise the Board”; and (ii) “violat[ed] its obligation of candor with the Board.”² Neither of these stated purposes pertains to the threshold objective bad faith issue before the Board. Indeed, the Division’s Motion does not allege that Alton Coal’s Reply raised new factual or legal issues pertaining to the threshold objective bad faith issue, rather they take issue with Alton’s characterization of their arguments. Regardless of whether or not the Division agrees with Alton’s assessment of the lack of merit to the positions taken by the Division, there is no legitimate basis for a Sur-Reply. Merely wanting to shore up its own credibility is an insufficient excuse for the Division to further encumber the record.

In its Response Brief, the Division discussed its perceived role to advise the Board (see DRB, p. 1), and Alton Coal was entitled to take issue with their premise. This tangential, ancillary topic has nothing to do with the ultimate issue before the Board.

¹ In its Opening Brief (“OB”, p. 3, n. 3), Alton Coal encouraged the Division to refrain from filing a Response Brief because (i) the Division has no standing in this fee dispute; and (ii) the Division’s original positions were clear in the merits proceedings (for instance, the Division originally stated that Petitioners’ claims were attempts to “confuse” and “misuse” governing law (see Reply Brief, Ex. AC, pp. 37-38)).


² Utah Admin Code R641-104-250 (“The signature will be deemed to be a certification by the signer that he or she has read the pleading and that, he or she has taken reasonable measures to assure its truth.”)

Furthermore, as to the Division's candor, Alton Coal respectfully submits that the Division's own signed pleadings speak for themselves.³ Alton Coal did not file a Motion to Strike the Division's Response Brief, primarily to avoid burdening this Board with another round of briefs unrelated to objective bad faith. This Board does not need to entertain another round of briefs on the unrelated issue of the Division's candor.

Finally, this Board issued an Order on April 2, 2015 (see OB, Ex. A), which Order set forth the briefing schedule regarding the threshold issue of objective bad faith. The Order is quite clear as to what pleadings are allowed. See id., p. 3. A Sur-Reply is not permitted, and the Order expressly states that "[t]he Board does not anticipate any further briefing opportunity." Id. There is no reason for this Board to diverge from its Order to entertain arguments unrelated to the threshold objective bad faith issue.⁴

The Division's Motion to File a Sur-Reply should be denied. If, however, the Board decides to admit further briefing on this issue, rather than considering the Division's Sur-reply, ACD requests to move to strike the Division's Response Brief, allow the Division to respond to ACD and then allow ACD to reply to the Division.

SUBMITTED this 13th day of October, 2015.


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³ Utah Admin Code R641-104-250 .

⁴ The Board's rules of practice and procedure do not provide for a Sur-Reply. The only reason the Division seeks a Sur-Reply is to respond to perceived attacks on the Division. This fosters no statutory purpose of the Board, which is presently adjudicating a dispute between Alton Coal and Petitioners. Since the Division is not a party and will be unaffected by the outcome of this proceeding, further briefing regarding the Division will not further the Board's administration of justice.

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2015, the foregoing **OPPOSITION TO THE UTAH DIVISION OF OIL, GAS & MINING'S MOTION FOR SUR-REPLY** was served electronically upon the following:

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